

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 10 December 2002**

**IN THE MATTER OF:**

LINA THOMPSON,  
Claimant,

**v.**

Case No.: 2001-LHC-2023  
OWCP No.: 18-56788

U.S. DEPARTMENT OF THE NAVY,  
Employer,

**and**

CONTRACT CLAIMS SERVICES, INC.,  
Carrier,

**and**

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.

**BEFORE:** Thomas M. Burke  
Associate Chief Administrative Law Judge

**APPEARANCES:** Thomas De Benedetto, Esq.  
For the Claimant

William N. Brooks, II, Esq.  
For the Employer/Carrier

**DECISION AND ORDER**

This proceeding arises from a petition for modification filed by the U.S. Department of the Navy (Employer) against Lina Thompson (Claimant) pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act") and as extended by the Non-Appropriated Fund Instrumentalities Act and the implementing regulations at 20 C.F.R. Part 702. A hearing was held on November 1, 2001 and January 9, 2002 in San Diego, California.

While working as a bartender for Employer, Claimant suffered a work-related slip-and-fall accident on March 5, 1994. Approximately ten days later, she again slipped, but caught herself on a shelf and did not fall. Then, on or about March 27, 1994, she felt a strain in her back when she tried to lift a five gallon container of syrup. Claimant sustained injuries to her back and right upper extremity. By *Decision and Order - Award of Benefits* dated August 11, 2000, Administrative Law Judge Ellin M. O'Shea concluded, in relevant part, that Claimant was entitled to an award of permanent total disability benefits from October 25, 1994 through September 30, 1997 and from April 1, 1998 and continuing, based on an average weekly wage of \$310.80.

## **I**

### **Issues presented**

Employer has filed a petition for modification of Judge O'Shea's *Decision* based on "four changes" that warrant modifying Claimant's award of compensation. First, Employer states that Claimant found employment with two separate employers on two different occasions subsequent to issuance of the August 11, 2000 *Decision and Order*. In particular, Employer's counsel stated the following at the hearing:

We contend that the earnings received from that employment was—were indicative of her post-injury wage earning capacity, at least for those period of time, and that she was not entitled to permanent and total disability benefits during those periods—benefits which were ultimately awarded by Judge O'Shea, because she didn't—was not aware of the fact of this post-trial employment.

*Hearing Transcript (Tr.)* at 9-10.

Second, Employer argued that Claimant relocated several times and failed to inform Employer, thus "hindering (its) attempts to identify suitable alternative employment at the original trial." *Tr.* at 10.<sup>1</sup>

Third, Employer maintains that it is entitled to a Section 14(j) credit for the two periods of time during which Claimant worked after the original hearing and had a post-injury wage earning capacity "but was ultimately receiving permanent and total disability benefits." *Tr.* at 12.

Finally, Employer argues that it has identified employment for Claimant and, if the this employment is found to be suitable, then the post-injury wage earning capacity should be modified retroactive to February 7, 2001, the date on which the petition for modification was filed.

---

<sup>1</sup> This argument is not properly before the undersigned and does not support Employer's petition for modification. Since January 2000, nearly two years before the undersigned's hearing in this case, Claimant lived in San Diego. Employer's job surveys were conducted in San Diego (as were the job surveys presented to Judge O'Shea). As a result, Employer has not established that its attempts to identify suitable alternative employment on modification were hindered.

Claimant, on the other hand, maintains that Employer's petition for modification, filed six months after issuance of Judge O'Shea's *Decision*, is premature. *Tr.* at 19. Moreover, Claimant maintains that her treating physician, Dr. Rawlings, found a "very serious worsening of her condition" and that she has developed right carpal tunnel syndrome as well as problems with her left upper extremity which preclude her from working. *Tr.* at 19.

Claimant's counsel states that the two jobs which Claimant held after the original hearing were for short periods of time:

She simply had no choice. She was not receiving benefits. It was work or starve. She worked in pain. She worked in pain as long as she could work, until she could not physically handle the job anymore. She had no choice.

*Tr.* at 22. Claimant objected to two labor market surveys conducted on January 2001 and September 2001 at the Employer's request because they list the Ace Parking Lot attendant position which was the "same exact position . . . previously identified in the initial trial, in a labor market survey dated October 8, 1996." *Tr.* at 24. Employer's counsel countered to state that it was "a new job with new equipment" and technological advances would make the job suitable for Claimant. *Tr.* at 25.<sup>2</sup>

The parties have stipulated to the following:

- an employer-employee relationship existed at the time of injury;
- Claimant suffered an injury which was work-related;
- the claim was timely noticed and timely filed;
- Claimant is entitled to compensation and medical benefits;
- Employer is currently providing compensation benefits;
- Claimant is not currently working;
- Claimant's average weekly wage is \$310.80; and
- no Special Fund relief is sought.

*ALJ Ex.* 1 and 2.

## II

---

<sup>2</sup> The issue of payment of Dr. Rawlings' bills for chiropractic care was withdrawn based on Employer's counsel's assertion that items related to chiropractic manipulation for subluxation of the spine would be paid. *Tr.* at 6-7. In post-hearing documents, Claimant's counsel continues to assert that Employer has failed to pay for Claimant's chiropractic care. Employer's counsel notes that, at trial, he requested an itemized bill which contained charges only for manipulation of the spine, which would be paid. To date, he states that he has not received such a bill from Dr. Rawlings. Claimant's counsel should submit a properly itemized bill of services for Dr. Rawlings, which include only charges for manipulation of the spine, and Employer will promptly render payment for the services immediately.

## Summary of the Evidence

### **A. Physical limitations set forth by Judge O'Shea**

The parties agree that Claimant suffered a work-related slip and fall accident on March 5, 1994. *ALJ Ex.* 1 and 2. Drs. Rawlings, Dodge, and Bernicker also note subsequent work-related injuries sustained in a slip around March 17, 1994 and increased back pain after lifting a five gallon container of syrup on March 27, 1994. *Cx.* 1, 5, and 7. The OWCP-5 completed by Dr. Larry Dodge on October 27, 1994 sets forth the following physical limitations:

- intermittent sitting (8 hours per day), walking (6 hours per day), lifting (4 hours per day), bending (4 hours per day), squatting (3 hours per day), climbing (3 hours per day), kneeling (2 hours per day), twisting (3 hours per day), and standing (6 hours per day);
- can lift no more than 20 to 35 pounds;
- no hand restrictions listed, such as grasping, pushing/pulling, fine manipulation;
- can reach and work above the shoulders;
- can use feet to operate controls repetitively;
- can operate a motor vehicle; and
- can work 8 hours per day.

At that time, Dr. Dodge concluded that Claimant reached maximum medical improvement. In her September 2000 *Decision*, Judge O'Shea added a physical restriction, *to wit*: Claimant's work cannot require "continuous, constant, repetitive use of the right upper extremity." Given the foregoing restrictions, Judge O'Shea concluded that Employer failed to demonstrate suitable alternative employment and found that Claimant was permanently, totally disabled.

### **B. Employment since Judge O'Shea's hearing**

Ms. Thompson testified that she had moved to different locations to be with her children prior to Judge O'Shea's February 24 and 25, 1999 hearing but that, since January 2000, she has resided in San Diego, California. *Tr.* at 68-71.

Three weeks after the hearing before Judge O'Shea, Claimant took a job at Smith's Food and Drug Centers. She worked there from March 14, 1999 until June 30, 1999 and received \$3,915.69 in wages. *Tr.* at 130-31; *Rx.* 11, p. 149. For two days, she worked in the deli, but could not do the work and so she was transferred to the photo lab where she developed film. *Tr.* at 131. She used her hands to take film out of the cartridge and load it into the film processing machine. *Tr.* at 132; *Rx.* 13 at 189. She worked 20 to 30 hours per week at the drugstore, during which she stood 50 percent of the time and she sat 50 percent of the time. She performed "very little" work at the cash register. *Rx.* 13 at 190. The job required no heavy lifting or carrying. *Rx.* 13 at 190. Her job was terminated when her employer's business was taken over by Fry's Food and Drug Centers. Claimant

testified that when Fry took over the business it changed the operation such that very heavy lifting was required for the changing of paper, and the operation required a use of chemicals for which Claimant lacked training. Claimant explained that she could not do the heavy lifting and her employer was unwilling to provide her training on the use of chemicals. *Tr.* at 133; *Rx.* 13 at 191.

Claimant subsequently worked at a deli run by Maloso Enterprises from June 16, 2000 until November 30, 2000. She earned a total of \$8,215.00, based on \$10.00 per hour for 40 hours per week. *Tr.* at 133. Claimant's duties were "cashiering, oversee the place, kind of manager/employee." *Tr.* at 133. She helped with catering and making sandwiches, which involved the use of her hands. *Tr.* at 133. Claimant testified that she quit because of pain in her arms, legs, and back; she stated that she was losing her grip in her right hand and, because she started using her left hand more, she was making mistakes:

I am not a left-handed person, and (I did) quite a few over-rings on the register using my left hand, and the owners were not too happy about it.

*Tr.* at 135, 136; *Rx.* 13 at 184, 185, 222. Claimant has not worked since leaving Maloso Enterprises. *Tr.* at 146. Claimant testified that she has been looking for employment, but most opportunities involve cashier work which she "can't do because of (her) hand . . ." *Rx.* 13 at 195, 220.

### **C. Current medical complaints**

Claimant testified that, since the original trial, she has had constant "complaints" about her neck, mid-back, lower back, and right arm. *Tr.* at 138; *Rx.* 13 at 204-205.<sup>3</sup> In particular, her neck pain is constant and has "gotten a little worse." *Rx.* 13 at 204-205. The pain in her mid-back, between her shoulder blades, is present when she stands and the pain in the shoulders has worsened. *Rx.* 13 at 206-207. Moreover, the pain in her right shoulder is "always there;" the pain goes down her right arm and is constant. *Rx.* 13 at 209. Her middle and ring fingers "curl" and she has to "massage" them in the morning because of the stiffness. *Rx.* 13 at 210. Claimant also experiences pain in the middle of her palm and she drops things. *Rx.* 13 at 211. Claimant stated that, the night prior to her deposition, she tried to lift a container of water to pour some into a glass and she dropped the container. *Rx.* 13 at 223. She experiences pain and stiffness, particularly in the mornings. *Rx.* 13 at 211. Claimant states that she wears a bandage for support on her wrist and fourth and fifth fingers when she does chores like cooking or shopping. *Tr.* at 74-75. She testified that she is always in pain and some days are worse than other days. *Tr.* at 74-75.

During her deposition, Claimant testified that her right thumb was swollen. *Rx.* 13 at 213. Her thumb was also found to be swollen by Dr. Rawlings during his May 15, 2001 examination of her. *Tr.* at 107. However, at the January 9, 2002 hearing, Dr. Dodge examined Claimant's right thumb and testified that he did not notice that it was swollen. *Tr.* at 316.

---

<sup>3</sup> References to *Respondent's Exhibit* 13 are to the Claimant's August 27, 2001 deposition transcript.

Claimant's lower back hurts when she walks, such as when she goes to the grocery store, and pain from her lower back goes down the right leg into her heel. *Rx.* 13 at 207-08. She "always" experiences numbness in the heel. *Rx.* 13 at 207-208. Claimant states that her lower back hurts when she is standing or walking. *Rx.* 13 at 208. She can stand for only 20 to 30 minutes before she has to sit down. *Rx.* 13 at 215.

Claimant started to experience left hand numbness while working for Maloso Enterprises. *Tr.* 155 She explained that she did not mention her left hand problems to Dr. Rawlings, her treating physician, from February 2001 to August 2001 because she was concentrating more on treatment for her legs and feet, which were "hurting worse." *Tr.* at 156. Claimant notes that it is painful for her to lift a frying pan and her roommate had to change the faucets on the shower because she could not shut off the water. *Tr.* at 158. She has difficulty tightening and loosening things. *Tr.* at 158. Claimant complains of pain in her fingers in the early morning or afternoon. *Tr.* at 158. Her right elbow and shoulder also hurt when she tries to brush her hair or brush her teeth. *Tr.* at 159-60.

Claimant experiences constant pain in the back of her neck, particularly when she uses her arm. *Tr.* at 161. She also has pain in her lower back, even through the night after taking a pain pill. *Tr.* at 161. The pain affects her ability to concentrate. *Tr.* at 162. When asked whether she would be physically able to clear tables, Claimant replied that she could not:

No, because that's what happened at Maloso. They say you don't have to do this, the next thing is there's no employees and you have to do it.

*Tr.* at 164.

Claimant testified that she wants to have the surgery recommended by Dr. Jeffry Bernicker to her right upper extremity. *Tr.* at 168. Her condition is worsening; sometimes she "wakes up every one-half hour to 45 minutes because of the pain." *Tr.* at 169.

#### **D. Medical treatment and diagnoses**

Claimant has received medical care from Kaiser Permanente because of pain in her arms and legs. *Tr.* at 139-40. However, while treating with Kaiser, Claimant developed additional medical problems:

I told them about the problems (with my arms), but they thought it was arthritis and told me to take pain medication, but I told them I took too much pain medicine for my back and had developed stomach problems. They then treated me for an ulcer.

*Tr.* at 141. Claimant testified that she has developed stomach problems because of the pain pills and that, at times, she goes three to four days without sleep in order to avoid taking pain pills. *Tr.* at 170. She testified that she ran out of pain pills one week prior to the hearing date, and that her physician in Mexico will not prescribe any more pain pills until her stomach heals. *Tr.* at 173-74.

Claimant first treated with Dr. Mark Rawlings in 1994 after her on the job injuries. Dr. Rawlings is a chiropractor and is a diplomat of the American Board of Chiropractic Orthopaedists. He stopped treating Claimant about the time of her injury and resumed care on February 6, 2000. *Tr.* at 90. He explained that Claimant had stopped coming for treatment after her injuries because “she was afraid that she’d be charged for the services” since the “bills were not being paid.” *Tr.* at 79. However, since the February 2001 examination, he has seen Claimant 27 times. During the February 6, 2001 examination, Dr. Rawlings noted the following:

She had pain restriction in cervical range of motion neck compression, cervical compression that caused neck pain, pain restriction in the lumbar range of motion, orthopedic tests were positive for lower back pain straight leg raise test was positive for lower back pain, and other orthopaedic tests were positive.

*Tr.* at 77-78. His records show that Claimant complained of “[n]eck pain, headaches, middle and lower back pain which was increased, right leg numbness, right wrist pain, and right elbow pain.” *Tr.* at 77. Dr. Rawlings also noted that Claimant began to have left arm pain which he concluded resulted from “overcompensating” for her right arm. *Tr.* at 117. During his May 2001 examination, Dr. Rawlings found that Claimant’s right wrist pain had worsened and was causing right thumb pain. *Cx.* 1. She had a full range of motion in the right wrist, but it was painful. *Cx.* 1. Testing also revealed back pain and limited range of motion in that area. *Cx.* 1.

Dr. Rawling’s examination of Claimant on October 23, 2001 revealed increased, constant right wrist pain: the “pain now shoots into all of her fingers with numbness and tingling.” *Cx.* 2. He noted that Claimant’s grip was weak and she had problems “manipulating” things. Dr. Rawlings reported that Claimant’s fingers were stiff and would “flex shut.” Moreover, he stated the following:

She has difficulty performing prolonged standing such as when shopping for approximately one hour at which time she needs to go home and rest due to sharp middle and lower back pain.

Dr. Rawlings diagnosed right carpal tunnel syndrome with denervation by nerve conduction studies dated October 12, 2001. Dr. Rawlings concluded that Claimant was temporarily, totally disabled in light of the confirmed diagnoses of carpal tunnel and her worsening condition “including additional new complaints in her left upper extremity.” He determined that Claimant required ongoing medical care, including possible surgery for right carpal tunnel syndrome as well as ongoing physical therapy and chiropractic treatment for her neck and back. *Cx.* 2.

Dr. Rawlings referred Claimant to an orthopaedist and neurologist in August 2001 as a consequence of her worsening symptoms. *Tr.* at 101-02. Dr. J. Sterling Ford, a neurologist, accepted Claimant as a patient and conducted nerve conduction studies which produced “evidence of carpal tunnel syndrome” of the right wrist. *Tr.* at 82. By report dated October 12, 2001, Dr. Ford noted that a “study of the right ulnar and median nerves revealed relative prolongation of the median

distal latencies.” Cx. 6. He further found that “[n]eedle examination of multiple muscles in the right upper extremity, representing all nerves and roots, revealed evidence of denervation, with reinnervation, isolated to the abductor pollicis brevis muscle.” Dr. Ford concluded that Claimant suffered from “right carpal tunnel syndrome with denervation.”

Claimant also saw Dr. Jeffrey Bernicker, an orthopaedic specialist, on October 10, 2001. Dr. Bernicker recommended that Claimant undergo right carpal tunnel release surgery. Cx. 5. Dr. Rawlings agreed. *Tr.* at 83. In addition to examining Claimant, Dr. Bernicker reviewed her medical records. Cx. 5. He noted her complaints of low back, neck, and right upper extremity symptoms. On examination, he noted “popping and grinding in the shoulder and pain when using the arm overhead.” Dr. Bernicker also found that Claimant exhibited limited range of motion and a weakened grip strength. He reported constant right wrist and hand pain and observed “popping” in the wrist, a diminished grip, and numbness in the right hand at primarily the fourth and fifth digits. Dr. Bernicker diagnosed right shoulder impingement, chronic lumbar strain, chronic cervical strain, right elbow contusion with mild lateral epicondylitis and probable cubital tunnel syndrome, right wrist sprain, and right carpal tunnel syndrome. He recommended right carpal tunnel release surgery and opined that an updated MRI of the lumbar spine and cervical spine was needed to “evaluate for possible disc pathology in the neck region, resulting in upper extremity radiculopathy.”

Dr. Larry Dodge, who is board certified in orthopedic surgery, saw Claimant on four occasions, including on August 3, 2001, when he conducted a physical examination and reviewed Claimant’s medical records. Cx. 7. His report noted that the Claimant complained of headaches, neck pain, right shoulder and arm pain, low back pain, and right leg pain. His examination revealed normal motor strength of the upper extremities, and diffuse tenderness throughout her entire right upper extremity, which he opined was consistent with more of a muscular problem as opposed to any neurological abnormality. *Tr.* at 275. A grip strength test revealed that her grip strength on the right hand was diminished about 60 percent as compared to the left side, but that the Claimant was reported as not having put forth full effort. Cx. 7, *Tr.* at 271. X-rays were taken of her right hand and wrist, and interpreted as normal *Tr.* at 271. Dr. Dodge offered the opinion that the Claimant’s complaint’s of pain in the right wrist and hand cannot be supported by medical evidence, that at most she sustained a right wrist and hand sprain. He added that Dr. Rawlings statement that the Claimant developed right thumb complaints from overuse and guarding and protecting the right wrist does not make any medical sense. Dr. Dodge testified that her complaints of numbness in the fourth and fifth fingers of her right hand was not indicative of carpal tunnel syndrome, as it is the wrong anatomical distribution. *Tr.* at 273. Dr. Dodge also noted that a May 27, 1994 MRI revealed the presence of mild posterior contusion at L5-S1 without any impingement against the central spinal canal.

Dr. Dodge’s diagnoses was lumbrosacral strain superimposed on mild degenerative disc disease, right wrist and hand sprain without evidence of fracture, right elbow and shoulder contusions, and chronic myofascial pain syndrome. Cx. 7.

Dr. Dodge’s most recent examination was on December 18, 2001. His diagnoses were:



1) Lumbrosacral sprain, superimposed on mild degenerative disc disease, without evidence of disc herniation on MRI study, currently minimally symptomatic.

2) Cervical strain, superimposed on mild degenerative disc disease of the cervical spine without evidence of cervical radiculopathy.

3) Electrodiagnostic evidence of carpal tunnel syndrome - unrelated to the specific injury of March 5, 1994 and industrial in nature.

4) Right elbow contusion.

5) Right shoulder contusion.

6) Functional overlay with chronic pain behaviors.

Dr. Dodge's December 18, 2001 report characterized Claimant as showing "gross signs of functional overlay," meaning she faked her examinations. Ex 18, Tr. 281-283; 326-327. He also opined that during her examination she revealed clear signs of malingering. A reason for his finding of functional overlay was his interpretation of the results of a grip strength test (Jamar Grip) to her right hand. Dr. Dodge reported that Claimant exhibited extremely poor effort, including a "0" effort, which he found to be virtually impossible unless there was complete paralysis. He cynically observed that her constellation of symptoms appear to migrate and vary.

Dr. Dodge also conducted the Falon's and Tinnell's tests to determine whether she suffered from carpal tunnel and the tests were negative. Tr. at 282. He also measured both of her arms and "the right arm, which was the affected extremity, was actually larger than her left arm." Tr. at 283. From this he concluded that there was no objective evidence to support a finding that Claimant was favoring her right arm. Tr. at 283. Dr. Dodge stated that it is normal for the dominant arm to be slightly larger, which is what he found with regard to Claimant, who is right-handed. Tr. at 283. He noted that Claimant did not complain of pain in her left upper extremity and, indeed, she has never complained of problems with her left upper extremity during any of the four examinations he conducted of her. Tr. at 280.

Dr. Rawlings disagreed with Dr. Dodge's dismissal of Claimant's right thumb problems. Dr. Rawlings opined that her "complaints in the right thumb are not simply pain complaints alone, she has restricted range of motion and swelling." Cx. 2. Dr. Rawlings noted that:

It would not be senseless to conclude that a chronic wrist condition, such as Mrs. Thompson has been experiencing for the past eight years or so, with limited range of motion and stiffness, could develop into complaints in the surrounding structures such as the right thumb. Anatomically, the tendons which manipulate the thumb pass through the wrist and, therefore, directly affect the thumb. Chronic irritation and inflammation of the thumb tendons at the wrist could pull and adhere these tendons

and lead to shortening and swelling at the thumb. Not only that, however, the patient has recently been confirmed to have carpal tunnel syndrome, which is compression of the median nerve at the wrist which supplies innervation to the hand and the thumb, another reason, in my medical opinion, for the patient's thumb complaints.

Cx. 2.

Dr. Dodge opined that Claimant's symptoms are "more consistent with a chronic musculature condition than that secondary to any significant disk disease or disk herniation." Cx. 7. Dr. Rawlings responded as follows:

I would agree that that is true, in part, but that she is more so suffering from chronic subluxations (vertebral segmental dysfunction) throughout her neck and back. The primary component of a subluxation complex are misaligned vertebrae. The secondary component is a muscular problem which would include muscle spasms. The lack or presence of any disk disease or disk herniation in no way minimizes the symptomatic effects of a chronic subluxation complex as Dr. Dodge apparently tries to point out.

Cx. 2.

Dr. Rawlings offered the opinion that Claimant's right thumb complaints developed as a result of overuse, guarding, and protecting the right wrist. Dr. Dodge countered to state that this "does not make any medical sense." Cx. 7. He noted that:

This patient simply has complaints of pain in the right wrist and hand which cannot be supported by medical evidence. At most, she sustained a right wrist and hand sprain as reported by the previous orthopaedic surgeon, Dr. Sidney Levine.

Dr. Bernicker also disagreed with Dr. Dodge. Dr. Bernicker opined that the nerve conduction studies constituted medical evidence in support of Claimant's hand and wrist complaints, and "certainly negate the contention by Dr. Dodge...that the patient simply has complaints of pain in right hand and wrist which cannot be supported by medical evidence." Cx. 5.

It is determined that the medical evidence does support Claimant's hand and wrist complaints. Dr. Dodge may reasonably take issue with Dr. Rawlings explanation of the cause of the Claimant's right wrist and right hand complaints, that is, it could very well be that the Claimant's problems with her right hand and wrist did not occur as a result of overuse, guarding, and protecting the right wrist. But the opinions of Dr. Rawlings and Dr. Bernicker, as well as the results of the nerve conduction studies, demonstrate that the problems do exist.

Dr. Dodge agrees that the Claimant's medical records reveal that Claimant "had complaints intermittently of some wrist pain" since 1994. *Tr.* at 319. He also agrees that the Claimant may

have developed carpal tunnel syndrome by the time of the hearing. His biggest quarrel with Dr. Rawling's diagnosis is the cause of the carpal tunnel, in that he argues that the condition is not work-related. *Tr.* at 273.

Dr. Dodge acknowledged that Dr. Schiemer diagnosed mild focal median neuropathy at the carpal tunnel, but he stated that it was unrelated to a specific injury. *Tr.* at 285; *Rx.* 17. Dr. Dodge explained that "[t]he classic symptoms of carpal tunnel are usually pain, numbness and tingling of the hand, using the thumb, index, and long finger." *Tr.* at 293. Dr. Dodge acknowledged that Dr. Levine, in his March 1995 report, stated that Claimant struck her wrist on an appliance and he agreed that Claimant, during her testimony at the previous hearing, recalled that her wrist hurt after the accident and it was swollen. *Tr.* at 297. He also noted that Dr. Rawlings had reported complaints of right wrist pain in his April 1994 report, which was issued five weeks after the accident. *Tr.* at 310. Thus the medical record leaves little room for argument that the Claimant has complained of, and has been diagnosed as having, a problem with her right wrist since after her 1994 injury. Dr. Dodge's dispute is about the cause of the wrist and hand problem. Such a dispute is not relevant to a ruling on the presence of suitable alternative employment. To establish suitable alternative employment, the employer takes the disabled employee as he finds him. The alternative employment must be one that the employee can perform considering all physical problems, not just those caused by the on the job accident. *New Orleans Stevedores v. Turner*, 661 F.2d 1031 (5<sup>th</sup> Cir. 1991)

#### **F. Suitable Alternative Employment**

Employer presented vocational surveys conducted by Paul Johnson on January 30, 2001 and September 28, 2001. *Rx.* 9, 10. Paul Johnson is certified by the Society for Human Resource Management as a Senior Professional in Human Resources. *Tr.* at 194. He has worked in the field of vocational rehabilitation since 1975. *Tr.* at 194. Johnson has a *Master of Arts* degree in Psychology from Pepperdine University in Los Angeles, California and he specializes in vocational rehabilitation services under the LHWCA. According to Esther Yeakley, of Contract Claims Services, a vocational survey was requested in January 2000 after Claimant returned to San Diego. This survey formed the basis for the present modification proceeding. *Tr.* at 187.

Johnson testified that Claimant has transferrable skills, including the ability to make change and take inventory, and that she is bilingual, which "makes her particularly employable in a border community such as San Diego." *Tr.* at 198. His a job survey was conducted based on Judge O'Shea's restrictions of no continuous, repetitive use of the right upper extremity. *Tr.* at 201. Johnson testified, in particular, that "the limitation was not against repetitive, it was against continuous repetitive" which is "an extremely important qualifier." *Tr.* at 224.

Dr. Dodge recommended an additional restriction for Claimant of "no repetitive, forceful gripping and grasping, in light of the carpal tunnel syndrome in Claimant's right extremity." *Tr.* at 290, 323. He described this restriction as using her hand "in a forceful fashion, like grabbing a hammer . . . where (she has) to apply a great deal of force" greater than 50 percent of an eight hour work day. *Tr.* at 328. He also recommended that Claimant take Motrin or another mild anti-

inflammatory and, “if it becomes increasingly symptomatic, (she) can wear a . . . wrist splint at night time when (she) sleeps.” *Tr.* at 327. He also reviewed the surveillance tapes of Claimant and noted the following:

She was performing things on the surveillance which far exceeded the activities that she claimed she could do when she was in the office and far exceeded her decreased Jamar grip strengths—which were virtually none—and far exceeded her ability to bend, stoop, twist, et cetera.

*Tr.* at 287. He stated that people with mild carpal tunnel syndrome usually continue to work. *Tr.* at 289.

Initially, Johnson testified that the positions he identified did not require continuous, constant, and repetitive use of Claimant’s arms; rather, the positions required “frequent and intermittent use.” *Tr.* at 220. He defined “continuous repetitive” as “100 percent of the time” during the shift. *Tr.* at 224. Johnson stated that he was not able to consider Claimant’s worsening condition as presented at the hearing in conducting his surveys. *Tr.* at 225.

There are two potential job categories which Employer asserts are suitable for Claimant given her restrictions. First, Employer sets forth the job of Ace Parking Lot Attendant.<sup>4</sup> Some parking lots have bar-coded machines and, at such facilities, Claimant would have the following duties:

Takes numbered, previously time and date-stamped (bar coded) claim tickets from customers, and swipes bar coded tickets through the reader. Collects parking fee based upon charges electronically calculated for the time the vehicle was parked on the lot, and returns appropriate change to the customer when necessary. Accurately reconcile cash drawer for daily transactions at the end of each shift worked.

*Rx.* 9, p. 118. Not all facilities have the bar-coded machine, but Johnson stated that “every effort would be made to accommodate (Claimant) with job assignments to parking facilities that do utilize electronic fee computers.” *Rx.* 9, p. 118. Also, Claimant may have to sweep the stairwells of a multi-level structure one or two times per shift for several minutes. Johnson noted that the multi-level structures are staffed with more than one cashier so no single cashier “would be required to sweep *all* of the stairwells, or even necessarily to sweep an *entire* stairwell at such a structure.” *Rx.* 10, p. 133. Dr. Dodge found that Claimant is able to perform the duties of Ace Parking Lot Attendant. *Tr.* at 277.

The parking attendant position would require stooping or bending on rare occasion at the beginning or end of a shift to replenish tickets. It would also require frequent and intermittent reaching, handling, fingering, and flexion (tilting head forward). Johnson also noted that the position may require frequent rotation (turning the head left or right) or Claimant could rotate from the waist.

---

<sup>4</sup> There are other parking lot positions identified by Johnson which have similar job requirements.

According to DOT Code 915.473.010, Claimant would be required to lift 20 pounds occasionally, lift 10 pounds frequently (such as bags of rolled coins), and she could elect to sit or stand. Claimant would also be required to push the cash drawer closed frequently and intermittently. Frequent and intermittent activities occur 34 to 66 percent of the time during a shift.

Johnson noted that reaching and making change in the parking lot attendant position “would certainly be between 34 and 66 percent on a regular basis” which is frequent, but “depending upon the day of the week with the volume of business” it could exceed 66 percent of the time, which qualifies as a “constant” activity. *Tr.* at 227-28. Johnson testified that Claimant would be doing reaching, handling, and fingering activities each up to 66 percent of the time, continually throughout each day. *Tr.* at 230, 232.

Claimant testified that she could not work as a parking lot attendant “because the pain is getting worse” and she cannot do much with her right hand. *Tr.* at 151-52. She experiences “numbness and tingles” in the left hand, including the pinkie finger, ring finger, and middle finger. *Tr.* at 153-54. She testified that her left hand now “locks up” like her right hand and, for the last two to three months, she has had problems with the fingers on her left hand. *Tr.* at 155. During the hearing, Claimant demonstrated that she could hold a quarter, but she could not turn over her hand to hand the quarter to counsel; rather, she had to “drop it” in his hand. *Tr.* at 176. Claimant stated that she had to drop the quarter because of the pain in her hand. *Tr.* at 176. Moreover, Claimant states that she could not hold a quarter in her right hand, she would have to use her left hand. *Tr.* at 163.

Dr. Rawlings agreed that Claimant could not perform the job of a parking lot attendant and he stated the following:

[S]he needs to have the appropriate medical care. She’s got carpal tunnel now, diagnosed. You know, the other problem is with her thumb, swelling. Her left arm complaints, which have just arisen. I think she needs to get the appropriate medical care before she undergoes any work activities at this time.

*Tr.* at 85. In particular, the position of Ace Parking Lot Attendant would require frequent and intermittent reaching and handling activities which, according to Dr. Rawlings, is not appropriate for Claimant. *Tr.* at 86. Moreover, he testified that intermittent “fingering” activities required for the job would also be inappropriate. *Tr.* at 87. Dr. Rawlings stated that “any form of work activities would probably aggravate (the carpal tunnel) and make it worse.” *Tr.* at 115.

The other job category identified by Johnson as suitable for Claimant was hostess/cashier. Johnson described the job requirements as follows:

Hostesses courteously greet patrons, escort them to their tables and provide them with menus, or accompany them to waiting areas until their tables are ready. They may assist customers in planning special events such as parties and banquets, and

supervise and coordinate the activities of the dining room staff by insuring that waitpersons' assigned stations are not overloaded with guests at any one time, and they inform servers of all new guest arrivals.

Additional job duties may also include adjusting customer complaints and inspecting serving stations to insure that they are clean, neat, and contain all necessary dining room supplies. During peak lunch and dinner periods, they may assist waiters and waitresses by either periodically monitoring guests to insure that their coffee cups or water glasses are refilled, or they may clear salad plates, soup bowls and dinner plates as the need arises. If more plates need to be cleared than the Hostess can comfortably carry at one time, the Hostess locates a busperson and directs them to remove the additional plates, refill the coffee cups and water glasses or obtain additional eating utensils or napkins as necessary.

Hostesses also serve as cashiers. They receive cash or charge plates from waitpersons or customers, enter the amounts on the cash register, count currency and return appropriate change or credit cards when transactions are completed. They issue receipts for funds received. They may then total cash in the register and sums received via credit transactions to reconcile balances with posted invoices at the completion of each shift worked. They may also answer phones and record reservations when necessary.

*Rx.* 9, p. 118-19.

Johnson stated that the hostess/cashier position is light duty work requiring exertion of 20 pounds occasionally and ten pounds frequently. The position also requires significant walking (30 to 40 percent of the time) or standing (30 to 40 percent of the time) as well as sitting (10 to 30 percent of the time). The job would not require lifting more than five to seven pounds at one time, such as refilling drinks. The hostess "may" clear tables or she could instruct the busperson to perform such work. As a hostess, Claimant would engage in carrying activities occasionally and intermittently, pushing and pulling activities would be performed frequently and intermittently (such as depressing register or telephone buttons, closing the cash register drawer), stooping would be done occasionally and intermittently, and reaching would be done occasionally and intermittently.

Dr. Dodge concluded that Claimant would be able to perform duties of the hostess/cashier position. *Tr.* at 277. With regard to the possibility of bussing tables in the position of hostess, Dr. Dodge stated the following:

I still think that even if she had to bus tables, I think that that would be reasonable. You know, she's not going to be doing that greater than 50 percent of her eight hour day, bussing tables, as a hostess.

*Tr.* at 329.

Dr. Rawlings noted during his February 2000 examination that Claimant experienced neck pain, pain restriction in the lumbar range of motion, and orthopaedic tests were positive for lower back pain. *Tr.* at 77.

### III Discussion and Conclusions

#### A. Nature and extent of disability on modification

Section 22 of the LHWCA provides that any party may, within one year of the last payment of compensation, request modification of a compensation award based on a mistake in a determination of fact or a change in condition. 33 U.S.C. § 922. Claimant maintains that the modification petition in this case is premature and it is improperly based on job openings which were, or which could have been, presented at the original hearing.

In *Jensen v. Weeks Marine, Inc.*, 35 B.R.B.S. 174 (2001), the Benefits Review Board held that an employer is entitled to a modification proceeding based on evidence of current availability of jobs when it presents evidence of suitable alternative employment at the initial hearing, and on modification, puts forth evidence of a change in a claimant's economic condition, an example of which, according to the Board, is an improvement in the local labor market. The Board in *Jensen* discussed its decisions in *Lombardi v. Universal Maritime Service Corp.*, 323 BRBS 83 (1998) and *Feld v. General Dynamics Corp.*, 34 BRBS 131 (2000) which denied employers' petitions for modification. The Board reasoned that its decisions therein should be narrowly construed; their holdings should be limited to the proposition that when an employer presents no evidence of suitable alternative employment at the initial proceeding, and, on modification, puts forth no evidence of extenuating circumstances that prevented it from doing so, or a change in the claimant's economic position, employer is not entitled to modification based on evidence of the current availability of jobs. The Board reasoned that under those circumstances, the modification petition reflects nothing more than a change in litigation strategy for which modification is not available.

In the present case, Employer presented evidence of suitable alternative employment at the original hearing before Judge O'Shea, which Judge O'Shea found to be too vague to show whether Claimant was physically and mentally able to perform the work. Also, Employer's 2001 job market surveys presented in support of modification, list multiple hostess-cashier positions and multiple parking lot attendant positions with a change in the physical requirements of the job, i.e., the use of electronic scanners instead of manual entered tickets, which under *Jensen, supra*, constitutes a change in Claimant's economic position, as it evidences an expanded job market. This is sufficient under *Jensen* to allow Employer's modification petition to be considered.

Because Judge O'Shea concluded that Claimant was totally disabled, the burden shifts to Employer to establish the presence of realistically available job opportunities within the geographical area where Claimant resides and which she is capable of performing considering her age, education,

work experience, and physical restrictions, and which she could secure if she diligently tried. *New Orleans Stevedores v. Turner*, 661 F.2d 1031 (5<sup>th</sup> Cir. 1981); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59 (3d Cir. 1979). Moreover, Employer must provide the precise nature, terms, and availability of the jobs. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 B.R.B.S. 94, 97 (1988). If suitable alternative employment is not established, then Claimant is deemed totally disabled. *Manigault v. Stevens Shipping Co.*, 22 B.R.B.S. 332 (1989).

On modification, Employer presented through its vocational expert, Paul Johnson, the positions of Parking Lot Attendant and Hostess/Cashier as suitable alternative employment for Claimant. As a vocational expert Paul Johnson is qualified to present evidence of the existence of specific job openings. *Turney v. Bethlehem Steel Corp.*, 17 B.R.B.S. 232, 236 (1985). Johnson as well as Dr. Dodge, a board-certified orthopaedic physician, conclude that the positions identified in the 2001 surveys are within Claimant's physical restrictions and mental capabilities. In contrast, Dr. Rawlings, Claimant's treating physician, contends that Claimant is physically unable to perform these jobs given her worsening condition, which includes development of carpal tunnel syndrome in her upper right extremity and pain in her left upper extremity.

As previously set forth, the physical restrictions set forth by Dr. Dodge and adopted by Judge O'Shea are as follows:

- intermittent sitting (8 hours per day), intermittent walking (6 hours per day), intermittent lifting (4 hours per day), intermittent bending (4 hours per day), intermittent squatting (3 hours per day), intermittent climbing (3 hours per day), intermittent kneeling (2 hours per day), intermittent twisting (3 hours per day), and intermittent standing (6 hours per day);
- lifting no more than 20 to 35 pounds;
- reaching and working above the shoulders permitted;
- using feet to operate controls repetitively permitted;
- operating a motor vehicle permitted;
- can work 8 hours per day;
- no repetitive, forceful gripping or grasping (a revision by Dr. Dodge at the undersigned's hearing, the OWCP-5 contained no hand restrictions); and
- no continuous, constant, repetitive use of the right upper extremity (a restriction added by Judge O'Shea after the original hearing).

#### *Parking Lot Attendant*

Claimant's background as a bartender is convincing proof that Claimant is mentally able to take money and make change as a parking lot attendant and that she is able to reconcile the cash drawer for daily transactions at the end of her shift. Moreover, Claimant would be able to sit or stand at her option which is also within her physical restrictions. However, it is a matter of concern that the fingering, reaching, and handling activities required of a parking lot attendant would exceed



Claimant's physical restrictions. Although Dr. Dodge noted some exaggeration by Claimant of her symptoms during his most recent examination of her, there is objective evidence of record to demonstrate that Claimant's physical condition is deteriorating. In particular, objective testing results from nerve conduction studies performed after the original hearing demonstrate the presence of carpal tunnel syndrome in Claimant's right extremity. Dr. Dodge attributed Claimant's hand and wrist problems to a sprain. Drs. Rawlings and Bernicker conclude, on the other hand, that the nerve conduction studies support a finding that Claimant's hand and wrist complaints have a neurological basis. Johnson maintains that "every effort" would be made to place Claimant at a parking lot with electronic fee computers and bar-coded tickets, but admittedly she could be placed at a lot where a cash register is used, requiring the handling and fingering of tickets and money.

Johnson opines that the parking lot attendant position does not require continuous, constant, and repetitive use of Claimant's arms, which he defined as "100 percent of the time" during a shift. Rather, he stated that the position required only "frequent" use, which is defined as 34 to 66 percent of the time during a shift. He stated that reaching and making change required of the parking lot attendant would "certainly" occur between 34 and 66 percent of the time during a shift on a regular basis, which is "frequent." However, on cross-examination, he testified that, depending on the volume of business, these activities could exceed 66 percent of the shift, which makes them "constant" activities. Such constant reaching, handling, or fingering activities during a shift exceeds Claimant's physical restrictions as set forth by Judge O'Shea and Dr. Dodge and, therefore, precludes the parking lot attendant position job from constituting suitable alternative employment. Moreover, Johnson concedes that he was not able to consider Claimant's worsened condition in analyzing the appropriateness of the jobs.

Dr. Rawlings persuasively argues that even "frequent and intermittent" handling, reaching, and fingering activities required of Claimant for the parking lot attendant positions would not be appropriate. He reasons that "frequent" and intermittent use of the right upper extremity will promote further deterioration of Claimant's condition. This would include, according to Dr. Rawlings, repetitive swiping and repetitive manipulation of the wrist.

Dr. Larry Dodge has been licensed to practice medicine in the State of California for 21 years. *Tr.* at 265. He is board-certified in orthopaedic surgery and is a clinical instructor for orthopaedic surgery at the University of California in San Diego. *Tr.* at 266. Although Dr. Dodge has excellent credentials and he concludes that Claimant could perform this job, the opinion of Dr. Rawlings is accorded greater weight as he has served as Claimant's treating physician over a lengthy period of time. Indeed, Dr. Rawlings examined Claimant 27 times since February 2001 and his opinion regarding Claimant's worsened condition is supported by objective medical data. Therefore, the record supports a modification of Claimant's physical restrictions to include no frequent and intermittent use of the right upper extremity as well as a finding that the parking lot attendant positions would exceed this limitation.

*Hostess/cashier*

The remaining position which Employer offers as suitable alternative employment is hostess/cashier. Again, Claimant is mentally capable of taking money and making change as required of this position. However, she would also be required to walk for 30 to 40 percent of the shift and stand for 30 to 40 percent of the shift. Thus, Claimant will be walking and/or standing for 60 to 80 percent of her shift each day. All of the physicians of record conclude that Claimant suffers from back pain, leg pain, and right elbow pain. Dr. Rawlings noted that Claimant suffers from middle and lower back pain and his testing confirmed limited range of motion in Claimant's neck, back, and right leg. Given Claimant's symptoms, a position which requires standing and walking for 60 to 80 percent of a work day would not be suitable for Claimant.

Moreover, as with the parking lot attendant position, the hostess/cashier positions would require frequent and intermittent pushing and pulling activities, such as depressing register or telephone buttons and closing the register drawer, activities which the Claimant is unable to perform in light of her inability to engage in frequent and intermittent use of her right upper extremity. Claimant was found to be credible when she testified that she experienced aggravated pain in her right hand while working as a hostess/cashier at Maloso Enterprises. She found it painful to bus tables and she was losing her grip in her right hand. Also, Claimant testified that she "became ill in her legs" and the pain in her back was "aggravating" because she was standing for many hours. Dr. Dodge stated that Claimant could perform the job of hostess/cashier and could bus tables up to 50 percent of the time during a shift. However, with job duties which include bussing tables, taking and making telephone calls, and operating the cash register, it is reasonable that the hostess/cashier would perform reaching, handling, and fingering activities at least "frequently," and possibly "constantly," during a shift which the undersigned finds would exceed her current physical restrictions.

The surveillance tapes submitted by Employer for consideration do not alter the conclusions reached in this matter. Thurman's surveillance tape taken on October 12, 2001 was reviewed at the hearing. He testified that he was only able to tape Claimant's activities on one of the three days that he was assigned to watch her. The tape revealed Claimant wearing a sunhat, trimming roses, and wiping the window of a Geo Metro. Ms. Olafson's tape dated October 17, 2001 was also reviewed. Claimant went to the Hallmark store around 11:09 a.m. From 11:51 a.m. until 2:45 p.m. she was at Wal-Mart. Claimant parked in a space designated for handicapped persons. The tape demonstrated that she reached for and inspected clothing, jewelry, and kleenex. Claimant wore flat sandals with socks, she walked slowly with a slightly uneven gait, and she would often lean on her cart while walking or reaching for an item in the store. At 1:07 p.m., she shifted her weight on her leg while looking at something. From 3:11 p.m. until 3:18 p.m., Claimant shopped with a basket at the grocery store. She was able to carry the basket containing some produce during this time although it affected her posture and gait. By 3:29 p.m., Claimant was at home. These tapes reveal that Claimant has the ability to walk, stand, bend, stoop, and reach. Indeed, this is within the restrictions set forth by Judge O'Shea and the undersigned. However, given the slow pace of Claimant's movements, the light items which she carried or held, and the fact that she leaned on her cart when walking or standing for a significant portion of the time, it is determined that her movements do not demonstrate that Claimant could work in a higher paced environment, such as

serving as a full-time hostess/cashier at a restaurant.

Based on the medical evidence, Claimant's credible testimony regarding her level of pain while working as a hostess/cashier at Maloso Enterprises, and the objective data of record establishing that Claimant's physical condition is worsening, it is determined that the hostess/cashier positions do not constitute suitable alternative employment.

**B. Section 14(j) credit**

The provisions of Section 14(j) provide that, "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j). Here, Employer did not make advance payments of compensation; rather, it seeks to obtain a credit for wages earned by Claimant in two post-injury jobs. Claimant testified that she worked at these positions on a short-term basis because Employer failed to pay compensation for her injuries until after issuance of Judge O'Shea's *Decision* and she needed the money. Employer has cited no authority for an award of Section 14(j) credit under these circumstances.

**C. Post-injury wage earning capacity**

Employer argues that Claimant's short-term work at Maloso Enterprises and Smith's Food and Drug Centers establish her post-injury wage earning capacity. Based on the medical evidence and job duties at Maloso Enterprises, as discussed *supra* at pages 19 and 20 herein, the undersigned finds that Claimant worked as a hostess from June 2000 to November 2000 through extraordinary effort and in spite of marked pain and diminished strength. As previously noted, Claimant credibly testified that she experienced aggravated pain in her right hand while working as a hostess/cashier at Maloso Enterprises. Further, she found it painful to bus tables and she was losing her grip in her right hand. Also, Claimant testified that she "became ill in her legs" and the pain in her back was "aggravating" because she was standing for many hours. It is evident that working under these conditions does not demonstrate a post-injury wage earning capacity for Claimant. *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451, 7 B.R.B.S. 838, 850 (4<sup>th</sup> Cir. 1978), *aff'g* 5 B.R.B.S. 62 (1976).

Moreover, while the Claimant's part-time job processing film at Smith's Food and Drug Centers for three and one-half months appeared to be within her physical limitations, the position was terminated when the company changed ownership and Claimant was not trained to process a different type of film or to work with chemicals. Employer cannot establish post-injury wage earning capacity through the use of this job because it has failed to establish that the job is currently available. *Carter v. General Elevator Co.*, 14 B.R.B.S. 90, 97 (1981). Indeed, based on Claimant's testimony at the hearing, the job is not currently available.

Based on this record, Employer has failed to demonstrate that Claimant has a post-injury wage earning capacity.

**ORDER**

IT IS ORDERED that Employer's petition for modification is granted but the relief requested is denied; and

IT IS FURTHER ORDERED that Claimant's counsel shall, within 20 days of the date of this *Order*, submit a properly itemized bill of services for Dr. Rawlings to Employer, which include only charges for manipulation of the spine, and Employer shall render payment for the services immediately.

**A**

Thomas M. Burke

Associate Chief Administrative Law Judge